§1988. Proceedings in vindication of civil rights; attorney's fees.

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases, where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981, 1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

(As amended Nov. 21, 1991, P.L. 102-166, Title I §§ 103, 113(a), 105 Stat. 1074, 1079; Nov. 16, 1993, P.L. 103-141, § 4(a), 107 Stat. 1489; Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle C, § 40303, 108 Stat. 1942.)

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
MAR 15 12 45 PM '93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VINCENT KOOPMAN,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	NO. 88-2573-GTV
	)	
WATER DISTRICT NO. 1 OF JOHNSON COUNTY, KANSAS,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Before the court is plaintiff's motion (Doc. 113) for attorneys' fees and litigation expenses under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988. Defendant opposes (Doc. 122) plaintiff's motion. The motion is denied.

In this action plaintiff alleged that defendant deprived him of a property interest in continued employment without due process of law in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff sought reinstatement -- or front pay in lieu of reinstatement -- back pay, damages for emotional distress, and litigation expenses, including attorneys' fees. The case was tried to a jury from November 2 through 6, 1992.

At trial, the court concluded as a matter of law that plaintiff was not given procedural due process. Therefore, the only issues submitted to the jury were: (1) whether plaintiff possessed a property interest in continued employment; and, if so, (2) what actual damages plaintiff incurred. The jury found that plaintiff had a property interest in continued employment, but also found that he would have been discharged whether or not he had been provided procedural due process. Consequently, the jury awarded plaintiff nominal damages of $1.00. Plaintiff now contends that he is entitled to recover his attorneys' fees.

The Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of section[] ... 1983 ... of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id. "Congress intended to permit the ... award of counsel fees only when a party has prevailed on the merits." *Hanrahan v. Hampton*, 446 U. S. 754, 758 (1980) (*per curiam*).

A plaintiff is a "prevailing party" for attorneys' fee purposes when the actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby*, ___U.S.___, 113 S. Ct. 566, 121 L.Ed.2d 494, 61 USLW 4033, 4035-36 (1992). The Supreme Court has held that a plaintiff who receives an award of nominal damages is a "prevailing party" in order to claim an award of attorneys' fees. *Id.*, __ U.S. at __, 61 USLW at 4036. Accordingly, plaintiff is the "prevailing party" in this case for section 1988 purposes.

In *Farrar*, however, the Supreme Court stated:

> Although the "technical nature" of a nominal damages award or any other judgement does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award under *Hensley v. Eckerhart*, 461 U.S. 424 [ ] (1983) [citation omitted]. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." [citations omitted]. In this case, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought. This litigation accom-

> plished little beyond giving petitioners "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated" in some unspecified way. [citation omitted]. We have already observed that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." [citation omitted]. . . . "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." [citation omitted]. Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness [citation omitted]. . . .
>
> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action "must always be designed 'to compensate injuries caused by the [constitutional] deprivation.'" [citations omitted]. When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all.

Id., __ U.S. at __, 61 USLW at 4036-37.

In this case, plaintiff sought total actual damages in excess of $200,000. Although he was able to establish that he was deprived of a property interest without due process of law, plaintiff was unable to prove that he suffered any actual damages as a result of that deprivation. The jury awarded him only nominal damages of $1.00. Under those circumstances, the court concludes that this case is directly on

point with *Farrar*. Mindful of *Farrar's* holding that where a plaintiff recovers only nominal damages because of a failure to prove an essential element of his claim for monetary relief, *e.g.* that he suffered actual injury, the only reasonable attorneys' fee is usually no fee at all, the court denies plaintiff's motion for attorneys' fees and litigation expenses.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiff's motion for attorneys' fees and litigation expenses (Doc. 113) is denied.

Copies of this Memorandum and Order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 16 day of March, 1993.

G. T. VAN BEBBER
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

DEC 13 1994

PATRICK FISHER
Clerk

VINCENT KOOPMAN,

Plaintiff-Appellant,

v.

WATER DISTRICT NO. 1 OF JOHNSON COUNTY, KANSAS, and ROGER FAIRBANKS,

Defendants-Appellees

No. 93-3095

Appeal from the United States District Court
for the District of Kansas
(D. C. No. 88-2573-GTV)

Stephen J. Dennis of Niewald, Waldeck & Brown, Kansas City, Missouri, for Plaintiff-Appellant.

Daniel M. Zimmerman (Marty T. Jackson with him on the brief), of Speer, Austin, Holliday & Zimmerman, Olathe, Kansas, for the Defendants-Appellees.

Before MOORE, LAY,[1] and MCWILLIAMS, Circuit Judges.

[1]The Honorable Donald P. Lay, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

LAY, Senior Circuit Judge.

In the first appeal of this case, this Court reversed in part a grant of summary judgment in favor of Water District No. 1 of Johnson, Kansas, ("the District") as to Vincent Koopman's due process claim relating to his alleged wrongful discharge in November of 1986. *See Koopman v. Water Dist. No. 1*, 972 F. 2d 1160 (10th Cir. 1992). Trial was thereafter held; the district court ruled as a matter of law that Koopman had been denied both a pretermination and a post-termination hearing. The District thereafter claimed that Koopman would have been terminated for cause whether or not he was afforded due process. The jury returned a verdict in favor of Koopman for one dollar. The court then denied Koopman attorney's fees and this appeal followed.

On appeal Koopman asserts error in the instructions and claims the district court abused its discretion failing to award attorney's fees. We affirm the judgement of the district court on the merits; we reverse and remand for determination of reasonable attorney's fees to be awarded Koopman under the facts and circumstances of the case.

DISCUSSION

The District hired Koopman in 1982. In October of 1986, Koopman's supervisors met to discuss his excessive absenteeism. At that time, he held the position of Utility Man II. Koopman submitted to a physical exam which revealed he had chronic back condition of spondylosis. The physician indicated that Koopman should not do the heavy lifting required of Utility Man II. Koopman was thereafter terminated and told there were no vacant positions for workers with his physical limitations. The District refused to review its decision, despite Koopman's express disagreement with the examining physician. Koopman thereafter brought this suit, alleging that the District had not provided him with a proper pretermination or post-termination hearing as required by the Fourteenth Amendment's guarantee of due process, that his termination had been retaliatory, and that his

termination violated his First Amendment rights.[2]

In this appeal, Koopman asserts that the court, notwithstanding its entry of judgment as a matter of law, should have instructed the jury more fully concerning the requirements of pretermination and post-termination hearings and informed the jury that they could award Koopman damages for emotional distress.

DUE PROCESS

The court instructed the jury that

> [i]f a public employee has a property interest in continued employment he or she may not be deprived of that interest without due process of law, guaranteed by the Fourteenth Amendment. In such cases, due process consists of a pretermination hearing and a post-termination hearing. Whether plaintiff received a pretermination hearing or a post-termination hearing and whether those hearings were adequate are not issues about which you need to make a determination in this case.

In addition, the court told the jury "if you find that plaintiff had an implied contract of employment then as a matter of law, defendant deprived plaintiff of a property interest without due process of law."

The jury asked several questions during their deliberations as to what they could permissibly consider while deliberating if Koopman would have been discharged "whether or not [he] was afforded Constitutional due process." Without knowing what due process involved, Koopman insists the jury could not answer the question. He contends

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[2]In the first appeal this court upheld that portion of the district court's grant of summary judgment for the District based upon Koopman's claim of retaliatory discharge. *Koopman*, 972 F.2d 1160.

the court should have instructed that a pretermination hearing must include notice, an explanation of the employer's evidence, and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). He also contends the jury should have been instructed that the post-termination hearing should have been more elaborate to allow for definitive factfinding. *See Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10th Cir. 1989).

The District responds that because the jury was not to consider whether Koopman got due process, they did not need to know what due process entails. Further, the District contends even if the omission was erroneous, it did not affect any of Koopman's substantial rights because the District provided unrebutted evidence showing Koopman was discharged because of his back condition.

As the case was submitted, we hold that all the jury needed to decide was whether Koopman's medical condition was sufficient reason for his termination and whether the District could have provided a job opening suitable for him. At trial, Koopman did not present any medical opinion contradicting the examining physician's report or make any showing that the District had a suitable job opening. We hold the trial court did not err in refusing to give instructions on the procedural requirements of due process.

DAMAGES FOR EMOTIONAL SUFFERING

Koopman urges there was sufficient evidence for the court to have instructed jurors that they could award damages for the emotional suffering the denial of due process caused him. He argues that if there is any evidence of mental distress, the issue of damages should go to a jury. *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989). Koopman contends he testified his inability to get his termination decision reviewed left him "very distressed" and caused him "a lot of

stress."[3]

In *Wulf* we reviewed an award of damages under §1983 for mental anguish and distress arising from a wrongful termination of plaintiff's employment. We allowed damages because both Wulf and his wife testified he was under tremendous emotional strain from the loss of his job, but remanded with instructions to reconsider the amount of the award. *Id.* at 875.

Wulf is clearly distinguishable. Wulf's loss of his employment was wrongful and the issue of whether there was sufficient proof of emotional suffering from the denial of due process did not arise. Testimony by a plaintiff, and by one closed to him or her, of emotional distress, supported by inferences readily drawn from the facts surrounding and following from the denial of procedural due process are sufficient to support an award of damages. *Carey v. Piphus*, 435 U.S. 247 (1978).[4] Here, Koopman offered no witness to corroborate his testimony as to his mental state. The circumstances of the case afford no basis for inferring the cause of Koopman's reported stress was the denial of due process rather than his termination.

BURDEN OF PROOF

This issue essentially revisits the first issue Koopman raised. Koopman argues the District failed to meet its burden of showing he would have been terminated even if he had received due process. Because jurors were not told what due process required, they could

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[3]Koopman did so testify, but he made those statements in response to this question: "Mr. Koopman, as a result of your termination and as a result of your efforts unsuccessfully to get your matter heard before the Water Board, can you tell the Court and jury how that made you feel?" Koopman answered: "Well, I was very depressed after I was terminated for a while and it caused a lot of stress." Neither the question nor the response distinguishes between emotional suffering due to the termination and suffering due to the denial of due process.

[4]In *Piphus*, the Supreme Court held that mental and emotional suffering consequent to a denial of procedural due process were compensable, but were not to be presumed. *Id.* at 262-64. The Court indicated customary ways of showing distress sufficed, as "evidenced by one's conduct and observed by others." *Id.* at 264 n.20.

only speculate whether the District would have terminated Koopman even if Koopman had been given due process.

The jury verdicts make clear that jurors believed Koopman was terminated because of his back problems. Providing adequate pretermination and post-termination proceedings would not change that fact.

ATTORNEY'S FEES

Lastly, Koopman argues the court was in error to deny his motion for attorney's fees. Koopman contends he was a prevailing party by proving the District violated his due process rights, and that he vindicated an important constitutional right. The Civil Rights Attorney's Fees Award Act, 42 U.S.C. §1988(b), permits a court to award attorney's fees to the prevailing party in a §1983 action. It is clear that under *Farrar v. Hobby*, Koopman is a prevailing party because he was awarded nominal damages. 113 S. Ct. 566, 573 (1992). but 42 U.S.C. §1988(b) also states the prevailing party is only to receive "a reasonable attorney's fee." Thus, the inquiry here, as in *Farrar*, involves determining what would be a reasonable attorney's fee.

In *Farrar*, the Court stated that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.* at 574 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The Court offered the general conclusion that is usually appropriate to deny fees when only nominal damages were awarded. However, the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), observed:

> [t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a

> civil rights plaintiff actually recovers. (citation omitted).

We distinquish this case from *Farrar* on several grounds. As Justice O'Connor observed in her concurring opinion, Farrar "filed a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant." *Id.* at 575. In addition, Farrar's suit could not fairly be said to have any prospect of benefitting anyone other than Farrar. Koopman's victory, like Farrar's did little for him personally, but in sharp contrast to Farrar's, had significant implications in establishing basic rights for public employees holding a similar property interest. *See Arnett v. Kennedy*, 416 U.S. 134, 167 (1984) (stating the "right [to due process] is conferred, not by legislative grace, but by constitutional guarantees.") ; *see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (observing that in enacting § 1988, Congress intended to encourage plaintiffs to act as private attorney generals). In addition, in this case the District erroneously obtained a summary judgement against Koopman's constitutional claim. This required Koopman's attorney to undergo a time consuming appeal to vindicate Koopman's right to a jury trial.

Unlike the litigation in *Farrar,* this litigation has not been protracted nor are the claims for damages extravagant and, as Koopman claims, his victory sends an important message to the District. As a result of this case, the District is on notice that it must provide its employees with constitutionally adequate pretermination and post-termination hearings. This is a significant victory. Although it is true Koopman received only a nominal award, the present and future employees of the District benefit by having their rights affirmed.

It does not appear to us this is the kind of case *Farrar* was intended to discourage attorneys from taking. It is true Koopman was not successful in proving he was damaged, but we do not believe he and his attorney should bear the entire cost of battling the District's unconstitutional practices. Deterring meritorious lawsuits on constitutional issues because they offer a small likelihood of a significant

money judgment presents as grave a danger to our legal system as frivolous litigation. In the past, we have attempted to balance these concerns in cases where nominal damages were awarded but which involved the vindication of a constitutional right of significance extending beyond the plaintiff by reducing rather than denying the award of attorney's fees. *See, e.g., Nephew v. City of Aurora* , 830 F.2d 1547 (10th Cir. 1987) (en banc) (holding that even though plaintiffs were awarded nominal damages, attorney's fees could be awarded where the amount of the fee was reduce because plaintiffs did succeed on all counts), *cert. denied,* 485 U.S. 976 (1988).[5]

It is indisputable that Koopman did not prove actual damages and so under *Farrar* is not entitled to full reimbursement for attorney's fees and costs. Nonetheless, his lawsuit was successful in important ways. We remand the issue of the appropriate amount of attorney's fees and costs to the district court.

We AFFIRM in part and REMAND in part for further proceedings consistent with this opinion.

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[5]Compare *Nephew* with *Butler v. Dowd,* 979 F. 2d 661 (8th Cir. 1992) (en banc), *cert. denied,* 113 S. Ct. 2395 (1993), where the Eighth Circuit affirmed a nominal award of $1 against warden to four prisoners who were subjected to sexual assaults, but upholding an award of attorney's fees to plaintiffs' counsel in the sum of $94,680.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VINCENT KOOPMAN,	)	
	)	
Plaintiff - Appellant	)	
	)	
v.	)	No. 93-3095
	)	
WATER DISTRICT NO. 1 OF JOHNSON COUNTY, KANSAS, and ROGER FAIRBANKS,	)	
	)	
Defendants - Appellees.	)	

ORDER
Entered January 30, 1995

Before SEYMOUR, Chief Judge, MCWILLIAMS, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, LAY,* Circuit Judges.

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*The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eight Circuit, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35 (b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No mem-

ber of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By L. Bahzano
Deputy Clerk